United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1447

NO. 74-1447

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RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States similarly situated,

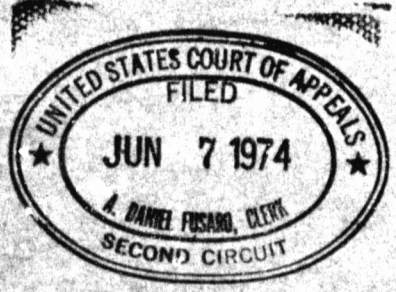
Appellants-Plaintiffs,

v.

LEONARD H. CHAPMAN, as Commissioner of the Immigration & Naturalzation Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Appellees-Defendants.

BRIEF FOR APPELLANTS-PLAINTIFFS



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IN THE UNITED STATES COURT OF APPEALS
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RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINCE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States similarly situated,

Appellant-Plaintiffs,

v.

LEONARD H. CHAPMAN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Appellees-Defendants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Did the appellees-defendants meet the heavy burden required of them under the equal protection principles of the Fifth Amendment in justifying a policy of discrimination against resident aliens?

2. Whether appellees-defendants could establish their discriminatory policy by administrative fiat?

3. Whether the operating instructions which implemented appellees-defendants' discriminatory policy are void as violative of the rule-making procedures of the Administrative Procedure Act?

STATEMENT OF THE CASE

This appeal tests the constitutionality of an Immigration and Naturalization Service policy which requires the departure of the alien spouses and immediage family members of permanent resident aliens, while they await the issuance of immigrant visas to which they are absolutely entitled as visa numbers become available.

The administrative policy, never sanctioned by any act of Congress, requires the splitting up of family units for periods of two years or longer. However, the policy permits the immediate families of American citizens, unlike the families of permanent resident aliens, to remain together.

This appeal tests the constitutionality of this invidious and harsh discriminatory policy.

STATEMENT OF FACTS

The appellants-plaintiffs in this action are aliens who have been found by the Immigration & Naturalization Service to be deportable from the United States, and the spouses of such aliens, who are lawful permanent residents of the United States. In each such instance, the deportable alien appellants-plaintiffs are natives and citizens of Western Hemisphere countries and have established entitlement to an immigrant visa based upon their marriage to a lawful permanent resident of the United States, and need only await the availability of an immigrant visa (subject to

the Western Hemisphere annual numerical limitation of 120,000) to become lawful permanent residents. Under present conditions, after the filing of a Western Hemisphere visa application and the contemporaneous assignment of a priority date for visa assignment, the subsequent wait for visa assignment can be as long as 22 months or more. In the case of each plaintiff, defendants are vested with discretionary authority to stay deportation in order to permit the deportable alien to remain with his family in the United States pending visa availability, 8 U.S.C. § 1254(e). In each instance, however, defendants have refused to exercise their discretion in favor of plaintiffs and have either ordered the involved aliens deported, or have refused to extend the date for voluntary departure.

The refusal of defendants to exercise their discretionary authority in favor of these plaintiffs does not result from an impartial and objective consideration of their particular cases, but constitutes the routine implementation of a policy which was effectuated by defendants on August 1, 1972. Prior to that date, for obvious humanitarian reasons, defendants regularly granted stays of deportation pending visa availability to Western Hemisphere aliens with immediate relatives in the United States until a Western Hemisphere visa number became available, and the involved alien might travel to an American Consulate abroad to obtain an immigrant visa and return as a lawful permanent resident.

Appellees-Defendants aforementioned policy was regularly implemented until June 1, 1972. At that time Subcommittee Number 1 (the Immigration & Nationality Subcommittee) of the House Committee on the Judiciary, through its Chairman, Representative Peter W. Rodino, Jr., issued a critical report concerning appellees-defendants' policy of permitting Western Hemisphere aliens with permanent resident spouses or close relatives to remain in the United States pending visa availability. He recommended that such policy be discontinued and that Western Hemisphere deportable aliens with permanent resident close relatives be forbidden to remain in the United States while awaiting immigrant visas.

As a direct and immediate result of Congressman Rodino's request, the Commissioner of the Immigration & Naturalization Service issued new "operating instructions" which were released on July 17, 1972, and which were implemented on August 1, 1972. These operating instructions which were never published in the Federal Register and for which no lawful rule-making procedure was implemented, created a wholly new policy for treatment of requests for stay of deportation by intending immigrants. Under the new policy, Western Hemisphere intending immigrants are divided into two distinct classes by appellees-defendants in determining their eligibility for stays of deportation, (1) those with United States citizen immediate relatives continue routinely to enjoy stays of deportation as they did under appellees-defendants' previous policy

and (2) those whose immediate relatives in the United States are lawful permanent residents but not citizens, are routinely denied stays of deportation pending visa issuance, except in cases of the most extreme hardship and compelling equities.

This policy was modified by the Immigration & Naturalization Service upon receipt of a further communication from Representative Rodino dated March 28, 1973, stating that the Commissioner should consider issuing instructions to delay enforcing departure of natives of the Western Hemisphere who are spouses or unmarried sons or daughters of aliens admitted to the United States for permanent residence. This suggestion was implemented immediately as a new policy by the INS, and the Service openly admits this was done at the request of Subcommittee No. 1 of the House Judiciary Committee. On information and belief shortly thereafter, after consultation with Representative Rodino, the Service issued instructions that the policy was to be implemented only as to close relatives of permanent resident aliens if both the presence of the affected alien and the relationship occurred before April 10, 1973. If either the relationship to the permanent resident or the presence of the alien in the United States occurred after April 10, 1973, departure would not be deferred.

Both Rodolphe Noel and Eddy Antoine Petit were present in the United States on April 10, 1973. However, both were married

subsequent to that date,--Petit on June 26, 1973 and Noel on April 19, 1973. Had they been married on or before April 10, 1973, departure would have been deferred to permit them to remain with their spouses who are deportable aliens who have been discriminated against under appellees-defendants' new policy. The present action was brought as a class action under Rule 23 of the Federal Rules of Civil Procedure on the part of the named plaintiffs and the class which they represent--deportable aliens in the United States with permanent resident immediate relatives and the immediate relatives of such deportable aliens awaiting visa availability under the Western Hemisphere numerical limitation.

STATUTORY SCHEME

The policy under attack is an outgrowth of the 1965 Amendments of the Immigration and Nationality Act (P.L.89-236,79 Stat. 916). In 1965 Congress abolished the national origin system of visa allocation and imposed an over-all annual numerical limitation on immigration. For the first time numerical limitations were placed on immigration from the Western Hemisphere and a ceiling of 120,000 was established as the annual quota, effective July 1, 1968, (Section 21 of the Act of October 3, 1965, P.L.89-236, 79 Stat. 916). An immigration ceiling of 170,000 was imposed on the Eastern Hemisphere making a total of 290,000 immigrants per year.

Congress recognized that the children, spouses or parents of United States citizens fall into a special category and special

relief was afforded to them regardless of where they came from. Thus the immediate relatives of American citizens are not subject to numerical limitations on total lawful admissions [(8 U.S.C. §1151(b)] and are not subject to the labor certification requirements of 8 U.S.C. § 1182(a)(14).

The statutory scheme also provides that specified close relatives of resident aliens would be granted special relief. Under 8 U.S.C. § 1153(a)(2), if not born in the Western Hemisphere, such persons are granted preference rights with respect to issuances of visas under the Eastern Hemisphere quota of 170,000. Such relatives are granted exemption from the labor certification requirements in the same way as the immediate relatives of United States citizens. See 8 U.S.C. § 1182(a)(14).

Parents, spouses and children from the Western Hemisphere of permanent resident aliens are also granted labor certification exemptions under 8 U.S.C. § 1182 (a)(14). They are entitiled to the grant of immigrant visas subject to the numerical limitation of 120,000 as "special immigrants," See 8 U.S.C. 1101(a)(27)(A) and Section 21(e) of the Act of October 3, 1965 (79 Stat. 921).

Because no preference is given to such close relatives from the Western Hemisphere of lawful resident aliens, they have to wait their turn for the grant of immigrant visas. In view of a backlog which commenced with 1968, the interval has grown to about two years for a visa to be granted on a first-come-first

served basis. It is this situation which led the Service, at the urging of Congressman Rodino, to establish the policy complained of.

JUSTIFICATION FOR INS POLICY

The purpose of the policy is quite clear, as specified by the Court below. Allowing such relatives from the Western Hemisphere to remain in the United States with their families while their visa applications were pending was having an "adverse effect on the domestic labor market." In addition, as the government candidly asserted in its brief below:

> Also, a practice developed whereby scores of Western Hemisphere aliens, unable to obtain labor certification, would come to this country ostensibly as temporary visitors and remain illegally in the hope of acquiring a relationship with an American citizen or permanent resident alien. Once that relationship was acquired, the major hurdle to immigration, the labor certification requirement, would be waived.
> Defendants' Memorandum of Law in Objection to a Motion for a Preliminary Injunction, p. 19.

Thus, the justification offered for the new policy was two-fold: (a) to protect the domestic labor market temporarily, since the Western Hemisphere immediate relative would eventually be entitled to immigrate, and (b) to discourage immigrants from the Western Hemisphere from "acquiring a relationship," with a permanent resident alien which would permit him or her to remain.

PROCEDURAL HISTORY

This action was commenced on August 24, 1973, by the filing of a complaint and an order to show cause to bring on a motion

for a preliminary injunction against the appellees-defendant's policy. The case was submitted without argument to Judge Gagliardi of the Southern District of New York. On February 4, 1974, Judge Gagliardi denied the motion for a preliminary injunction primarily on the ground that the INS had broad discretion on the grant or refusal of voluntary departure to groups of persons so long as the classifications are rationally related to the statutory scheme.

> The treatment of married Western Hemisphere aliens for purposes of extended voluntary departure on the basis of classification of spouse is reasonable in view of the statutory scheme which places no immigrant visa quota on spouses or citizens, but imposes a numerical limitation on spouses of permanent resident aliens. In practical terms, the apparent difference in time required to obtain a permanent visa substantiates the differentiation. Furthermore, it is certainly within the Service's discretion to conclude that other considerations may at some time warrant lenient treatment, but that to grant it in all situations would encourage aliens to enter illegally, and acquire the status, and would open a loophole in disregard of the statute.

The Court also held that the classification does not violate the equal protection clause since the classification had a substantial relationship to lawful objectives.

> The classifications in this case are no less substantially related to the statutory scheme which treats relatives of citizens differently from relatives of permanent resident aliens than those classifications based on other statutory distinctions which distinguish between the nature of the work one performs, see Buckley v. Gibney, [332 F.Supp. 790 (S.D.N.Y.) aff'd. 449 F.2d 1305 (2d Cir. 1971) cert. denied 405 U.S. 919 (1972)] or the citizenship of one's parents, see Application of Amoury, [307 F.Supp. 213 (S.D.N.Y. 1969)].

The Court also held at the requirements of the Administrative Procedure Act need not be followed in this instance.

A Notice of Appeal was filed on April 5, 1974. The appellees-defendants have voluntarily extended the date of departure for the appellants-plaintiffs Western Hemisphere immigrant spouses pending the determination of this appeal.

SCOPE OF REVIEW

Ordinarily, an appeal from the denial of preliminary injunctive relief poses a relatively narrow scope for review. However, where the district court has, in effect, finally determined the legal issues governing the disposition of the entire case, an appellate court should review the district court's decision as to those controlling legal issues. E.g. Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971) cert denied, 404 U.S. 869 (1971). FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 995 (D.C.Cir. 1968). Appellants-plaintiffs have presented their entire case to the court below on the motion for preliminary injunctive relief. The view of the law contained in Judge Gagliardi's opinion renders it impossible for appellants to prevail in any subsequent proceeding in the district court. Accordingly, this case is ripe for plenary appellate review.

SUMMARY OF ARGUMENT

I

The INS policy under review clearly violates the equal protection principles of the due process clause. It singles out resident aliens, a discrete and insular minority, and imposes discriminatory treatment on them.

The families of American citizens can remain together while the visa applications of Western Hemisphere immigrant family members are being processed, but the families of resident aliens in exactly the same position must be separated. Since the Supreme Court held in Sugarman v. Dougall, 413 U.S. 634 (1973), In re Griffiths, 413 U.S. 717 (1973) and Graham v. Richardson, 403 U.S. 365 (1971) that alienage is a suspect classification for equal protection purposes, this classification is subject to close judicial scrutiny. This is especially true since the right to marry and keep one's family together is deemed fundamental under the law.

The justifications offered by the INS for its policy are neither necessary nor rationally related to its alleged purpose. If the aim of the policy is to protect the domestic labor market, the government should not force all resident alien families to be separated whether any such member works or not. In addition, the policy does not reach Western Hemisphere immigrants married to American citizens who are a far larger employable group. If the

aim of the policy was to discourage fraudulant marriages by Western Hemisphere immigrants, the INS should attack that problem directly, not by penalizing all marriages between resident aliens and Western Hemisphere immigrants.

II

The INS policy is arbitrary and unreasonable and an unlawful exercise of administrative discretion. The courts have repeatedly held that the INS must act reasonably and fairly in its deportation policy. In view of the severe injury to resident alien families by the policy under review, it cannot be considered fair and reasonable. This is particularly true in view of the fact that Congress did not authorize or sanction the policy in any way. Without such authorization, any administrative policy restricting substantive rights should not be allowed to stand.

III

Furthermore, the INS policy affects substantive rights or resident aliens and their immediate family members. Since it has general applicability and future effect upon a defined class, it must be considered a rule for the purposes of the Administrative Procedure Act. But the rule-making requirements of the APA were not followed in this case. Thus the policy is invalid as violative of the applicable rule-making provision of the law.

ARGUMENT

POINT I

DEFENDANTS' POLICY VIOLATES THE EQUAL PROTECTION TENETS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

It is well established that the concept of equal protection of the laws provided for in the Fourteenth Amendment is also inherent in the concept of due process of law contained in the Fifth Amendment and is therefore, applicable to the federal government See Bolling v. Sharp, 347 U.S. 497 (1954). It is, therefore, necessary to apply equal protection principles to the classification at issue in this case to see whether it passes constitutional muster.

A review of the most recent Supreme Court decisions on point show that the government's attempted distinction in its treatment of resident aliens and United States citizens cannot stand.

A. Alienage is a Suspect Classification.

The most relevant cases at issue are not Village of Belle Terre v. Boraas, ____U.S.____, 39 L.Ed. 797 (1974) which reversed this court's decision reported at 476 F.2d 806 (2d Cir. 1973), nor Faustino v. Immigration and Naturalization Service, 432 F.2d 429 (2d Cir. 1970), both cited by the court below.[1/]

1/ In Belle Terre, the Supreme Court held that a local zoning

The relevant cases are Sugarman v. Dougall 413 U.S. 634, (1973) and In re Griffiths 413 U.S. 717 (1973). In both cases employment restrictions had been placed upon lawful resident aliens by the states and in both cases they were held to be illegal.

In the Sugarman case the four plaintiffs were registered resident aliens who were not permitted to assume competitive civil service positions because of a New York State law which declared aliens ineligible for the competitive civil service.

The Supreme Court held that a flat statutory prohibition against the employment of aliens into the competitive classified civil service was constitutionally invalid. The Court, citing Graham v. Richardson, 403 U.S. 365, 372 (1971), noted that aliens were a "prime example of a 'discrete and insular' minority" and that "classifications based on alienage" like those based on nationality or race were inherently suspect and were "subject to close judicial scrutiny," 413 U.S. at 642.

The New York statutory scheme was neither narrowly confined

Footnote cont'd.
ordinance restricting land use to one-family dwellings was constitutionally valid. However, the Court noted that if "the ordinance segregated one area only for one race, it would immediately be suspect." 39 L.Ed. 2d at 802. If land use were restricted for citizens only, it would also be suspect, as in the situation in the instant case. In Faustino the equal protection argument related to a provision of 8 U.S.C. §1151(b) that distinguished between immediate family members of citizens over or under 21 years of age. But age distinctions have never been considered suspect as has race, sex or alienage distinctions.

nor precise in its application. "The citizenship restriction sweeps indiscriminately," Ibid at 643. It was no answer to say that state employment was a privilege.

> "...this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege,'" 413 U.S. at 644.

In the Griffiths case, the issue was whether an alien could be lawfully barred from the practice of law simply because she was not a citizen. The Court noted that the 14th Amendment's equal protection clause was first invoked in a case involving a resident alien, Yick Wo v. Hopkins, 118 U.S. 356 (1886). It also cited the landmark case of Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), where a California statute barring fishing licenses to persons ineligible to citizenshp was held invalid. It made the following remarks about an alien's position in this society:

> Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities. 413 U.S. at 722.

It applied the following test:

> The Court has consistently emphasized that a State which adopts a suspect classification 'bears a heavy burden of justification,'...a burden which though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that is purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest.
> 413 U.S. at 721-22

The Court examined the various justifications offered for restricting the practice of law to citizens. It found that the states' interest in restricting the practice of law to citizens was not substantial and its use of the classification was not necessary for the safeguarding of its interest.

The third major Supreme Court decision in recent years regarding the rights of resident aliens is Graham v. Richardson, 403 U.S. 365 (1971). In that case the Supreme Court held that states could not exclude resident aliens from welfare benefits. The Court noted that the strictest equal protection test must be applied when either a fundamental right is impaired or a suspect classification is applied:

> The classifications involved in the instant cases... are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired. 403 U.S. at 376.

Quoting from the lower court decision, the Court said about aliens:

> We agree with the three-judge court in the Pennsylvania case that the 'justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro v. Thompson, 394 U.S. 618 (1969), aliens may live within a state for many years, work in the state and contribute to the economic growth of the state. Ibid.

Thus the most relevant Supreme Court cases treat alienage like race as a suspect classification which requires strict scrutiny.

B. Alien Residents Just as American Citizens Must Have the Right to Keep Their Families Intact.

Applying the Supreme Court test noted above to the facts of this case shows that the classification embodied in the defendants' policy cannot stand. The policy creates two classes of American residents: citizens and lawful resident aliens. If the former marries a Western Hemisphere immigrant, his family remains together while the application for an immigrant visa is being processed. If the resident alien marries a Western Hemisphere immigrant, his or her spouse must leave for two years.

If the INS established a policy of extending voluntary departure dates for the immediate families of all white residents but would not do so for the immediate families of black residents, that policy would be immediately invalidated. Such an illegal policy could not be justified on any alleged economic ground such as the fact that unemployment was high in areas where black immigrants traditionally worked.

If the INS said that female spouses of American residents could stay until their visas were acted upon but male spouses had to leave, that classification would also not be permitted, even if the INS could show that fewer women competed in the labor market than men. According to the Supreme Court decisions noted above, alienage is a suspect classification just as race, and a classification based on alienage can be upheld only if a compelling governmental interest can be shown.

Viewing the problem from the point of view of the right involved, the right to keep a family unit intact has been held to be of fundamental importance. The Supreme Court has said:

> Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U.S. 535, 541 (1952). See also Maynard v. Hill, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.[2/] Loving v. Virginia, 388 U.S.1, 12 (1967).

In a case involving the right of an unwed father to custody of his children, the Court made the following comments:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal

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2/ At an earlier time the Court had invalidated a state law that prohibited a white person and a black person of the opposite sex to live together. McLaughlin v. Florida, 379 U.S. 184, 196 (1964). The Court said:

> There is involved here an exercise of the state police power which trenches upon constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related to the accomplishment of a permissible state policy.

> is made to liberties which derive merely from shifting economic arrangements.' Kovacs v. Cooper, 336, U.S. 77, 95, (Frankfurter, J., concurring).
>
> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390 399, (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, (1952), and '[r]ights far more precious...than property rights,' May v. Anderson, 345 U.S.528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra. at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut,381 U.S. 479, 496, (Goldberg J., concurring). Stanley v. Illinois, 405 U.S. 645, 651 (1972).

The Court held that an Illinois law automatically depriving an unwed father of custody of his own children was invalid.

The Loving case establishes that the right to marry is a fundamental right which will be protected by the equal protection clause. The Stanley case emphasized the importance of maintaining family units. These rights attach to resident aliens as well as American citizens. The INS could not conceivably establish a policy denying resident aliens the right to marry Western Hemisphere immigrants until the latter became residents. Yet the policy under question in this case seriously hampers the right of resident aliens to marry Western Hemisphere immigrants by

requiring such a family to be separated for periods of two years or more. Such a burden on the fundamental right to marry or to maintain a family together cannot be upheld.

It is no answer to say that the federal government acting through the INS must make classifications based on alienage. Indeed, the creation of an Immigration & Naturalization Service itself is based on the federal government's plenary power to contrc immigration. The statute under which it acts is replete with alienage classifications.

No one denies that Congress has the power to establish general rules governing the way in which immigration and naturalization are controlled. But the policy under challenge here singles out lawful resident aliens living and working in the United States who have already fulfilled all the immigration requirements under the law. Their immediate family members from the Western Hemisphere alone must leave the country while their applications for immigrant visas are being processed. As such it denies the resident aliens a right which American citizens in exactly the same positions are routinely granted. Such a policy violates basic equal protection principles:

> The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. McLaughlin v. Florida, 379 U.S. 184, 189-190. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all person

> 'The Constitution does not require things which are different in fact...to be treated in law as though they were the same.' Tigner v. Texas, 310 U.S. 141, 147. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' Baxstrom v. Herold, 383 U.S. 107, 111, Louisville Gas Co. v. Coleman, 277 U.S. 32, 37...Royster Guano Co. v. Virginia, 253 U.S. 412, 415 . Rinaldi v. Yaeger, 384 U.S. 305, 308-09 (1966).

C. Appellees-Defendants can Show no Substantial or Compelling Governmental Interest for Their Policy

The Griffiths case establishes that a classification based on alienage can be upheld only if the government can show that "its purpose or interest is constitutionally permissible and substantial and that itsuse of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest," 413 U.S. at 722. The purpose for the classification at issue here has been openly admitted by the government. In its brief below the government said:

> ...the practice of aliens coming to this country as visitors and remaining illegally in the hope of acquiring the relationship had become widespread to the point where it adversely affected the domestic labor market.
> Defendants' Memorandum of Law in Opposition to a Motion for a Preliminary Injunction, p. 21.

In addition, it said:

> Also, a practice developed whereby scores of Western Hemisphere aliens, unable to obtain labor certification, would come to this country ostensibly as temporary visitors and remain illegally in the hope of acquiring a relationship with an American citizen or

> permanent resident alien. Once that relationship was acquired, the major hurdle to immigration, the labor certification requirement, would be waived. Ibid p. 19

In other words the appellees-defendants' policy was based upon a judgment that the continued presence in the United States of Western Hemisphere immigrant family members of resident aliens (1) would adversely affect the labor market and (2) might encourage a search for potential spouses and possibly fraudulent marriages. Each of these purposes must be examined against the Griffiths test noted above.

(1) Affect on the labor market.

If the purpose of the policy was to protect American citizens from competition for jobs during a period of economic depression, the policy is both overinclusive and underinclusive. That is, its reach is both too wide and too narrow, and therefore, is not necessary or even rationally related to its purpose.

The policy is overinclusive since it reaches all Western Hemisphere immigrants married to resident aliens whether or not the former are working. It may be that many or even most of such immigrants are not competing for jobs with American citizens. Yet the policy requires all such immigrants to leave the country whether or not they are employable. Thus, the policy reaches too broadly. It is a clumsy and drastic remedy not tailored to the purpose it supposedly seeks to achieve.

On the other hand, it does not reach broadly enough. It does not reach Western Hemisphere immigrants married to American citizens who are a far larger employable group. Since there are 200 million American citizens and only 4 million resident aliens,[3/] the potential family members of the former are far greater than the latter. Requiring Western Hemisphere immigrants married to American citizens to leave the country would have a far greater affect on the labor market. Yet the INS deliberately chose not to inconvenience the families of American citizens but focused on the weaker, more isolated, less politically influential, fewer family units of resident aliens, contrary to the purpose of the equal protection clause.

More important the policy is not rationally related to employment to any significant degree. Eventually, such Western Hemisphere immigrants will return to the United States and will become employable. The policy is therefore, at best a temporary expedient. If the INS were truly concerned about competition for jobs in a depressed labor market, it should attack the problem directly. It might try to determine how many spouses are wives unable to enter the labor market. It should discover how many

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3/ In fiscal year 1974 there were 4,031,340 resident aliens in the United States. In fsical year 1973 there were 4,127,811 resident aliens of whom 1,861,557 came from North America and 203,080 from South America. Annual Report of the INS, 1973, table 34.

such Western Hemisphere immigrants have skills in areas of manpower shortage and determine whether its policy is counterproductive. It may recommend to Congress that the labor certification exemption for such immigrants be removed or take other action with respect to particularly hard-hit industries. But, the policy as established is far more drastic than what is necessary for the purpose advanced.

(2) Discouraging Marriages and Fraudulent Marriages

The second justification offered by the government has even less validity. Western Hemisphere immigrants have a legal right to come to the United States as long as they fulfill the requirements of the Act and truthfully answer all questions put to them in their visa applications. While here they have the legal right to marry. The government cannot discourage them from exercising these rights and cannot harm their permanent resident spouses or family members by a latantly discriminatory policy.

A recent case in point is the Supreme Court's decision in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973). In 1971 Congress had amended the federal food stamp program by prohibiting the issuance of stamps to households whose members were not all related to each other. The alleged purpose was to prevent households of unrelated "hippies" from taking advantage of the food stamp program. But the amendment caught within its reach households of persons so poor that they

could not afford to live apart. The Court noted:

> The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a <u>legitimate</u> governmental interest. As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independant] considerations in the public interest, justify the 1971 amendment.' 413 U.S at 534-35.

Similarly, an INS "desire to harm politically unpopular and helpless Western Hemisphere immigrants and their permanent resident family members "cannot constitute a legitimate govemmental interest."

If the government is concerned about false application and fraudulent marriages by Western Hemisphere immigrants, the policy under question is again too broad and too narrow. It is too broad since it catches and penalizes all marriages between Western Hemisphere immigrants and resident aliens whether or not they were fraudulent. Surely the INS cannot assert that a majority or even a substantial proportion of such visa applications and marriages are fraudulent. Yet every such marriage is burdened by requiring a separation of family members for two years or more. That penalty is far too drastic for the purpose asserted.

In addition, the policy is far too narrow since it does nothing about the far greater number of marriages between

American citizens and Western Hemisphere immigrants.[4/] Thus, it is not rationally related to its own alleged purpose. In the Moreno case, the Supreme Court examined the purpose of preventing fraud which was alleged to be an aim of the 1971 amendment to the Food Stamp program. It said:

> ...in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. As previously noted, § 3(3) defines as an eligible 'household' 'a group of related individuals... [1] living as one economic unit [2]sharing common cooking facilities [and 3] for whom food is customarily purchased in common.' Thus, two unrelated persons living together and meeting all three of these conditions would constitute a single household ineligible for assistance. If financially feasible, however, these same two individuals can legally avoid the 'unrelated person' exclusion simply by altering their living arrangements so as to eliminate any one of the three conditions. By so doing, they effectively create two separate 'households' both of which are eligible for assistance
> Ibid at 537

It concluded:

> Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program

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4/ Since there are 200 million American citizens and 4 million resident aliens, the potential number of marriages between the former and Western Hemisphere immigrants must be far greater than between the latter and Western Hemisphere immigrants.

> not those persons who are 'likely to abuse the program' but rather only those persons who are so desparately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. 'Traditional' equal protection analysis does not require that every classification be drawn with precise mathematical nicety.' Dandridge v. Williams, 397 U.S. at 485. But the classification here in issue is not only "imprecise;" it is wholly without any rational basis.
> Ibid at 538

The way in which to handle the problem of fraud is to attack the problem directly by investigating and punishing all fraudulent claims or marriages, no matter by whom they were contracted. It cannot be done by the clumsy classification attempted here.

Thus the Griffiths test has not been met in any one of its respects.

POINT II

APPELLEES-DEFENDANTS' POLICY IS ARBITRARY, UNREASONABLE, AND AN UNLAWFUL EXERCISE OF ADMINISTRATIVE DISCRETION.

A. The Policy is Fundamentally Unfair.

It is clear that the action of appellees-defendants in granting or denying stays of admittedly valid orders of deportation is action lying well within the realm of agency discretion. It is equally clear, and equally well established, however, that discretionary administrative action may not be exercised in an arbitrary, capricious, or unlawful manner. Dismuke v. United States, 297 U.S. 167 (1956); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). More specifically, in the exercise of discretionary authority vested in the Attorney General in immigration matters, it has been repeatedly held that the Immigration Service must act reasonably and fairly in fixing any policy of forbearance of deportation of aliens, or in fixing any exceptions to such policy, and that such action is subject to judicial review and remedy. Del Mundo v. Rosenberg, 341 F. Supp. 345 (C.D.Cal. 1972). Lam Tat Sin v. Esperdy, 227 F. Supp. 482 (S.D.N.Y. 1964), aff'd. 334 F.2d 999, cert. denied, 379 U.S. 901. In fact, even in finding that an abuse of discretion was not demonstrated by a plaintiff who claimed that he should have been placed

into a special class of aliens for whom deportation was customarily stayed, the District Court for the Northern District of Illinois made the following cogent statement in Discaya v. Immigration & Naturalization Service, 339 F.Supp. 1034, 1036 (N.D.Ill. 1972):

> However, this court wishes to express some misgivings concerning the exercise of this important administrative discretion without any rules which structure and limit its exercise. As the significance of administrative authority becomes more pervasive, it becomes increasingly important that administrative discretion be limited, structured and checked by rules and/or articulated policies which will promote even-handedness of application...

Hence, it is apparent that discretionary action of the government agencies and of the Immigration & Naturalization Service, in particular, is regularly subject to judicial review to determine the reasonableness and fairness thereof.

In exercising its discretionary authority to grant or withhold stays of deportation to enable deportable Western Hemisphere aliens to remain in the United States pending visa availability, defendants have divided all applicants for such discretionary relief into two categories and further into two subcategories. Those aliens with American citizen immediate relatives are routinely granted stays of deportation; those with immediate relatives who are lawful permanent residents of the United States are not permitted to remain pending visa processing unless the deportable alien was in the United

States and the relationship to the permanent resident alien were both in existence prior to April 10, 1973.

Plaintiffs submit that there is absolutely no rational basis for the distinctions which defendants have made, and absolutely no valid governmental interest served by the policies defendants have implemented. To assume, as do defendants, that aliens awaiting visas with citizen spouses or parents in the United States are more deserving of administrative grace than are identical aliens with lawful resident spouses or parents is fundamentally unfair, and violative of the underlying egalitarian tenets of American jurisprudence. It is even more absurd and unfair to differentiate between aliens on the basis of an arbitrary date [April 10, 1973] before which the relationship, such as the marriage, must have taken place. There is no rational reason for treating an alien married on April 19, 1973 [Noel] any differently from an alien married April 10, 1973.

Because of a nine day difference in their date of marriage from the cutoff date [which, incidently, was established after April 10, 1973], Mr. and Mrs. Noel must now either be separated for 20 months or Mrs. Noel, a permanent resident alien must depart from the United States for 20 months. Essentially, defendants are determining which families shall remain intact pending visa issuance, and which shal

be separated, solely on the basis of the citizenship status of the deportable aliens' immediate relatives and an arbitrary date picked out of the air with no relevance to anything.

In the present case, the distinction made by the defendants based upon the alienage of a person's lawful resident relatives is "inherently suspect," and in the absence of any possible showing by the Government that such distinction serves a justifiable purpose, defendants' policy should be held invalid as being arbitrary and unreasonable. The policy of treating deportable aliens differently when all facts are identical except the date the relationship to a permanent resident occurred or the date the alien entered the country is even more "inherently suspect" and would necessitate even greater justification.

In the recent case of Del Mundo v. Rosenberg, 341 F. Supp. 345 (C.D.Cal. 1972), as in the case at bar, the plaintiff sought judicial review of a denial of a stay of deportation. In Del Mundo, plaintiff was a deportable alien who had married a Philippine native serving in the United States Navy, and sought to remain in the United States with him pending completion of his tour of duty. In connection with her motion for a preliminary injunction staying deportation, plaintiff had made a prima facie showing that the Immigration Service Policy was to grant such stays in nearly identical

situations, and that the requested stay of deportation was denied to her solely on the ground that her marriage to an alien serviceman was of short duration.

In finding for plaintiff, the court noted that its scope of review of discretionary action was necessarily limited but that the Court was, nonetheless, sensitive to the "great injustices that can be wreaked upon an individual wrongfully, or unnecessarily deported." After considering the distinction between marriages of short and long duration made by the District Director, the Court held that plaintiffs had made a prima showing of arbitrariness and capriciousness, and state [341 F.Supp. at 348):

> As with any grant of discretion to a public official, it must be tempered and regulated by certain fixed and settled principles. In this respect the District Director cannot, consistent with the character and obligation of administering justice impartially, decide in contrary ways two cases which are identical in every essential respect...

The Court further noted with respect to the distinction between long and short term marriages (341 F.Supp. at 348):

> This is at most a distinction without a difference, and in the eyes of the Court arbitrary, capricious and unreasonable. The District Director's reliance upon this distinction in making these disparate decisions is misplaced and brings his action within the ambit of the abuse of discretion test...

Plaintiffs submit that the matter presently before the Court is analogous to the situation in Del Mundo, supra. Both

cases clearly present a situation involving marriage. Del Mundo, supra involves the duration of the marriage whereas the case before the Court presents the question as to whether two situations which are identical in all other respects can be treated differently because the marriage took place before or after an arbitrary date. It is submitted that there is no basis for such a distinction. The distinction which the defendants herein have made between lawfully admitted permanent resident immediate relatives, and citizen immediate relatives is also a "distinction without a difference," and its continued impelementation by defendants cannot be regarded as consistent with the character and obligation of administering justice impartially. Hence, plaintiffs submit, it should be set aside by this Court as an abuse of discretion.

In addition to the above, plaintiffs also invite the attention of the Court to the case of Asimakopoulos v. Immigration and Naturalization Service, 445 F.2d 1362 (9th Cir. 1971) which also involved judicial reversal of the exercise of administrative discretion in a situation in many ways analogous to the case at bar. In Asimakopoulos, an alien sought judicial review of the denial by the Board of Immigration Appeals of a petition for suspension of deportation based on seven years continuous presence in the United States

as provided in Section 244 of the Immigration and Nationality Act. 8 U.S.C. 1254(a)(1). Under the statute such relief is initially left to the discretion of the Attorney General or his delegate. In Asimakopoulos, the Board invoked a standing policy which had previously been established in Matter of Lee, BIA 1966, 11 I & N Dec. 649, and under which the Board would not exercise its discretion in favor of an alien who had been in a "protected" status during a substantial portion of the statutory period unless he could show "particularly strong equities favoring him." The Court noted that the Board's "protected status" distinction was admittedly founded entirely upon a 1965 report of the House Committee on the Judiciary which contained a resolution opposing suspension of deportation of any alien who had spent the greater part of the statutory seven year period of continuous presence in a legal or protected status, and it noted that the Board had assumed that it was required to follow such Congressional "directive."

In an opinion which spared no words, the Court held that the Board's sheepish submission to the opinion expressed in the House Report was reversible error, not because it was an abuse of discretion, but because it constituted a total failure on the part of the Attorney General to exercise the discretion committed to him by statute. In so holding, the

Court noted (445 F.2d at 1365):

> Section 1254(c) authorizes congressional review of the Attorney General's decision in these cases, but nothing in Section 1254(c) permits either the Senate or the House to prescribe the standards by which the Attorney General shall exercise his judgment in making the decision initially delegated to him.
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> * * *
>
> The House Judiciary Committee does not speak for the whole Congress, particularly when the policies it announces run counter to policies manifested in the congressional enactments that made available the discretionary relief sought by the petitioners.

Plaintiffs urge that exactly the same rationale which supported the result in Asimakopoulos, supra, supports the judicial reversal and enjoining of the policy applied by defendants in the present case. Here, also, defendants' policy is based, not upon a valid exercise of discretion, but entirely upon directives issued by the Chairman of Subcommittee No. 1 (the Subcommittee on Immigration and Nationality) and later Chairman of the Judiciary Committee to the Commisioner of the Immigration and Naturalization Service. As such, defendants' policy of creating two classes and two subcategories of deportable aliens constitutes a failure by defendants to exercise the discretion conferred upon them by statute. Accordingly, denials of a stay of deportation under such policy are invalid, and defendants should be

prevented from deporting any aliens with immediate relatives in the United States until their requests for stays of deportation have been properly and lawfully adjudicated. It should also be noted that the justification for following the dictates of Congress in the Asimakopoulos case are even greater than in the instant case. In suspension of deportation matters, reports must be submitted to Congress. In the instant case, Congress has no legitimate involvement whatsoever with discretionary grants of stays of deportation.

B. The Policy is Not Sanctioned by Any Act of Congress.

The arbitrariness of appellees-defendants' policy is underlined by the fact that it is not required by any Congressional legislation. In fact, pending legislation described below will eliminate the policy. Thus the establishment of the policy cannot be said to be rationally based upon the statute which the INS is required to implement.

The statutory scheme is described above. There is nothing in the 1965 amendments to the law that requires the INS to distinguish between immediate family members of resident aliens for the purpose of setting voluntary departure dates. It is only because the law defines Western Hemisphere immigrants as special immigrants and established no preference system for them that the problem arises. But the statutory scheme cannot be construed as a command that the Service deal

with voluntary departure dates in a different way between the two classes involved. This is particularly true when the stated purpose of the policy is not rationally related to its aim and restricts important rights of a politically weak and insular minority group.

Viewed from another perspective the power of an administrative agency to affect a substantive right of an American resident is severely circumscribed when it is not based on a clear Congressional directive.

The passport cases are relevant examples. In Kent v. Dulles, 357 U.S. 116 (1958), the Court invalidated the Secretary of State's denial of passport applications by two citizens determined by the Secretary to be Communists. A broad delegation of authority by Congress to "grant and issue passports . . . under such rules as the President shall designate and prescribe" was held to be an inadequate basis for the Secretary's action.

> Since we start with an exercise by an American citizen of an activity included in constitutional protection [the right to travel], we will not readily infer that Congress gave the Secretary of State unbridled discretion to withhold or grant it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case . . . . We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of citizens [357 U.S. at 129].

In a similar passport case, Lynd v. Rusk, 389 F.2d 940 (D.C.Cir. 1967) the District of Columbia Circuit would not construe the Secretary of State's statutory power to issue passports to permit him to restrict the right of Americans to travel:

> . . . We think Congress has authorized the Secretary to require an applicant for a United States passport to refrain from using it in a restricted area and indeed from transporting it into a restricted area. Although the Secretary has the authority to decline to issue a passport when a traveler's sole purpose is to journey to restricted areas, he cannot extend that authority so as to withhold a passport when the applicant seeks to travel to a non-restricted area for any of the myriad purposes --business, tourism, scholarship--which make travel part of the "liberty" the Constitution protects. The passport must be issued to such a traveler even though while outside the United States he plans both to travel to a non-restricted area and also to visit a restricted zone. 389 F.2d at 943-44.

The court relied on the Supreme Court's decision in Kent v. Dulles and noted:

> The 1958 ruling in Kent v. Dulles, supra, is our touchstone. It establishes not only that the right to travel is protected by the Fifth Amendment, but that statutory limitations will be strictly construed. 'Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them,' 357 U.S. at 129, 78 S. Ct. at 1120. Mindful of the consequences to the citizen, the Court was unwilling to find that the broad language of the 1926 Act authorized the Secretary to take actions not legitimized by an administrative practice which Congress could fairly be said to have deliberately accepted. Ibid. at 945-46.

Similarly in this case, the broad language of Congress in establishing special immigrant status for Western Hemisphere immigrants and its statutory provision for voluntary departure cannot be construed to authorize the Service's policy involved herein. The right of a family to stay together cannot be undermined on the basis of Congressional silence on the key issue here.

Indeed pending legislation in Congress would eliminate the practice. Under proposed H.R. 981, 93rd Cong. 1st Sess. (1973), the two separate overall quotas would be abolished in favor of one overall numerical ceiling for the entire world of 250,000 per year. The visa preference system, now applicable only to the Worldwide quota, would be revised so as to apply to all areas including the Western Hemisphere. Under the proposed revision, aliens from any area who are the spouse, or unmarried son or daughter, or parent of a permanent resident alien would be accorded first preference status. Such aliens would continue to be exempt from the labor certification requirement, and aliens who are close relatives of United States citizens continue to be exempt from the numerical ceiling.[5/]

Another bill pending in Congress which would affect immigration from the Western Hemisphere is H.R. 982, passed

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5/ H.R. 981 was introduced by Congressman Rodino on January 3, 1973. It has not yet been passed.

in the House and pending in the Senate. The primary purpose of this bill is to make it unlawful for an employer to knowingly employ illegal aliens and to provide for the imposition of sanctions against such employers. However, the bill would also amend Section 245 of the Act, 8 U.S.C. §1255, so as to allow Western Hemisphere aliens to adjust their status in this country if they are qualified to immigrate.

If the bills are enacted, a Western Hemisphere alien married to a permanent resident alien would be entitled to first preference status. He would then be virtually at the top of the waiting list and would obtain permanent resident status after only a short waiting period. Moreover, it would not be necessary for him to leave the United States to obtain a visa for he could adjust his status in this country. It is expected that the Attorney General would not require such aliens to leave the country.

The government asserts that the pending legislation justifies the present policy since it would be unfair to enforce deportation of those aliens already having the requisite relationship as of April 10, 1973. But it also asserts that those without the requisite relationship should not be encouraged to come to the United States pending the consideration of the new legislation:

> Such a change would have served as an inducement to aliens to continue to enter this country, remain illegally, and acquire the specified relationship . . . Quite obviously, such an inducement would not be consistent with proper enforcement of this country's immigration laws. Defendants' memorandum, p. 24.

The government's argument is a total non-sequitur. If the policy of permitting families to remain intact before April 10, 1973 was consistent with the statutory scheme and pending legislation would require it, what justification can there be <u>based on the statute</u> for an interim period when they would not be allowed to do so?

As noted above neither a concern for unemployment by American citizens nor the fear of fraudulent marriages can justify it. Since the policy is not sanctioned by Congress and infringes important rights, it cannot be allowed to stand.

POINT III

THE OPERATING INSTRUCTIONS WHICH IMPLEMENTED APPELLEES-DEFENDANTS DISCRIMINATORY POLICY ARE VOID AS VIOLATIVE OF THE ADMINISTRATIVE PROCEDURE ACT

An essential feature of the Administrative Procedure Act [5 U.S.C. § 551 et seq.] is the requirement that agencies enact rules in a manner designed to insure that the public will be aware of the promulgation of a rule and will be given an opportunity to participate in the rulemaking process by submitting argument and views. To the agency to effectuate these ends, under 5 U.S.C. § 553, an agency is required to publish general notice of proposed rule-making in the Federal Register at least 30 days in advance of the adoption of the proposed rule, and to provide an opportunity for interested persons to participate in the rule-making process through the submission of written data, views or arguments. Exceptions to the rule-making requirement are made in case of "interpretive rules, general statements of policy, rules of agency organization procedure or practice". Under 5 U.S.C. § 551(4), a rule is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." "Rule-making" is defined under the same section as "agency process for the formulating, amending or repealing of a rule."

On August 11, 1972, the then Commissioner of the Immi-

gration & Naturalization Service, issued a new "instruction" relating to aliens who were natives of the Western Hemisphere with close lawful resident alien relatives. Such "instruction" discontinued the practice of permitting the families of lawful permanent resident aliens to remain in the United States while awaiting the availability of visa numbers except in cases of the most extreme hardship. Subsequent instructions, both oral and written, were issued by the Commissioner of the Immigration and Naturalization Service in March, April and May 1973 which modified the August, 1972 instruction by directing that deferred departure status be granted to Western Hemisphere natives who are the unmarried sons and daughters or spouses of permanent resident aliens except where the presence of the deportable alien in the United States or the relationship occurred after April 10, 1973.

Analyzed in terms of the definition of "rule" in the Administrative Procedure Act, there is no question that the Service's "instruction" of July 17, 1972, and subsequent instructions were "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy". In this regard, the fact that appellees-defendants chose to call these pronouncements "instructions" does not make them any less rules. In fact, courts have consistently held that it is not the label a particular agency puts upon a given exercise of agency power which is conclusive, but rather that it is what

the agency actually does which controls. See Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942). Here, defendant's instructions were clearly given general applicability and future effect, as to a specific clearly defined class of aliens. The standards by which stays of deportation were to be granted or withheld were sharply modified as to Western Hemisphere natives with alien permanent resident relatives in the United States. In fact, it is clear that the Service itself recognized that it was promulgating a new rule which would change the existing rights of a large class of people by providing that cases with dispositions made prior to the effective date, August 1, 1972, would not be disturbed, and that the same would be true of "pipeline" cases in progress.

In view of the fact that appellees-defendants "instructions" were clearly rules, thirty days notice of proposed substantive rulemaking, and an opportunity for interested persons to submit written data, were required unless the rule fits into one of the exceptions provided in § 553 of the Act. Appellees-defendants have taken the position, however, that the directives at issue here fit within the Acts exception for interpretive rules and statements of policy as contrasted with substantive or legislative rules.

The following statement taken from Professor Kenneth Culp Davis, Administrative Law Text (3d Ed. 1972, p.126-128) is

relevant to the analysis which the court must make:

> The law about the distinction between interpretative and legislative rules is quite troublesome, but at the two extremes the law is quite clear. One very solid proposition is this: Whenever a legislative body has delegated power to an agency to make rules having force of law (whether or not the delegation is explicit) the rules the agency makes pursuant to the granted power have the same force as a statute if they are valid, and they are valid if they are constitutional, within the granted power, and issued pursuant to proper procedure; a court may no more substitute its judgment as to the content of a legislative rule than it may substitute its judgment as to the content of a statute. [Emphasis Added]

It is apparent upon the above cited text that a rule is substantive if issued by an agency pursuant to statutory authority, where it implements the statute and has the force and effect of law.

Applying this test to the case at hand we find that the change in policy of April 1973 was issued under statutory authority given to the District Director under 8 U.S.C. § 1252 (e) and the applicable regulations thereunder. In Jay v. Boyd, 351 U.S. 345, (1956) and Accardi v. Shaughnessy 347 U.S. 260 (1954) it was held that administrative regulations of the Immigration Service have the force and effect of law.

It appears from the foregoing that if defendants discrimination against Western Hemisphere relatives of permanent resident aliens is constitutionally valid, it should be regarded as a substantive rule having a monumental impact on a large class of persons

requiring compliance with the Administrative Procedure Act.

In Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972), a class action was brought by aliens seeking to enter and reside in the United States who required a certification from the Secretary of Labor to the effect that there were insufficient domestic workers to fill the jobs they were entering, and that their admission would not adversely affect wages and working conditions (8 U.S.C. Sec. 1182(a)(14)]. The Secretary of Labor had previously published a schedule listing jobs in short labor supply and exempting alien applicants in such occupations from certain otherwise required showings. The Secretary of Labor, without first publishing in the Federal Register, suspended a portion of the published list. The Court ruled that the directive suspending a portion of the list had, in fact, changed existing rights and obligations which applied to the plaintiffs therein, and the class they represented, and held that by virtue of the substantial impact of the change upon aliens and employers, notice and opportunity comment by the public should first have been provided. Accordingly the Court declared the directive invalid until 30 days after it was actually published. See also, Pharmaceutical Manufacturers v. Finch, 307 F.Supp. 858 (D.C.Del. 1970); National Motor Freight Traffic Association v. United States, 268 F.Supp. 90,

96 (D.C.D.C. 1967)(3-Judge panel), aff'd per curiam, 393 U.S. 18 (1968); Seaboard World Airlines, Inc. v. Granouski, 230 F. Supp. 44, 46 (D.C.D.C. 1964). Similarly, Hou Ching Chow v. Attorney General, 362 F. Supp. 1288 (D.C.D.C. 1973), involved an action brought by an alien seeking review of a repeal of a regulation by the Immigration and Naturalization Service for failure to comply with the publication requirements of the Administrative Procedure Act. Administrative regulations provided that alien students who established that they had sufficient funds to support themselves while attending school were eligible to apply for permanent residence without complying with the necessity of obtaining a labor certification as required by 8 U.S.C. 212(a)(14) of the Immigration and Nationality Act Section 1182(a)(14). Thereafter, the Service revoked the student exemption. This was done by regulations published without notice and provided that students would now need labor certifications. Here, as in the Lewis-Mota case, the Government defended its action on the ground that the compliance with the rule making provisions of the Administrative Procedure Act was "Unnecessary in this instance because the rule prescribed by the order is interpretative in nature." The Court rejected this contention holding the regulation to be substantive under the Administrative Procedure Act.

Felipe Demaren, et al. v. Attorney General, 73 Civ. 1079 [Motion for preliminary injunction granted--May 16, 1973, Case #39477] involved the same kind of factual and legal issues as in the instant case. In Felipe Demaren the plaintiff, a native of the Western Hemisphere and the mother of two United States citizen children sought review of a denial of stay of deportation contending that a change in policy requiring a showing of extreme hardship on the part of the parent of an American citizen child (under 21) was invalid for failure to publish in the Federal Register. The court held the denial of plaintiffs' request for a stay of deportation was invalid stating:

> The policy, requiring a showing of "compelling humanitarian factors" was clearly a rule within the meaning of Section 551 (14) since it was ". . . the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." Moreover, none of the exceptions to the publication requirement enumerated in Section 553(b) seem applicable here. The policy was not a rule of ". . . agency organization, procedure, or practice . . ." and the agency had not made a finding that notice and public procedure would be ". . . impracticable unnecessary, or contrary to the public interest." Nor can a policy which so dramatically altered the prior practice of automatically granting stays to Western Hemisphere natives with citizen children be characterized as a mere "interpretive rule(s)" or "general statement(s) of policy." As Senator McCarran, a chief sponsor of the Administrative Procedure Act, pointed out in the Senate debates, the subsection requiring notice of proposed rule-making did not apply to ". . . rules other than those of substance . . ." 92 Cong. Rec. 2155 (1946). The obvious implication

> was that all substantive rules should be noticed in the Federal Register before they became effective unless the agency had good cause for not doing so. It is hard to imagine a more substantive rule than one which so significantly altered INS policy with respect to stays of deportation.

In the present case, the District Court denied the applicability of the publication requirements of the Administrative Procedure Act and of the rationale of Lewis-Mota, supra, because the alien plaintiffs were not already married to residents at the time of the appellees policy modifications. Such holding, however, ignores the purpose of the publication requirement in the act. The statement which the Court has implicitly made is that appellant-plaintiffs had no vested rights at the time defendants change in policy was implemented so that they cannot now be heard to complain. It cannot be denied, however that appellant-plaintiffs had pre-existing contingent rights which were extinguished by administrative fiat. Clearly, if appellants had known of appellees intentions prior to the change, the plaintiffs-appellants might have married prior to the cut-off date of April 10, 1973. Clearly if Notice of Proposed Rulemaking had been published by the Immigration Service, the public would have been given an opportunity to respond and submit views prior to the implementation of a new policy affecting the future rights of a large number of lawful permanent resident aliens who might marry non-resident aliens.

Finally, appellants note that if the District Court's interpretation of the Lewis-Mota decision and of the requirement of the Administrative Procedure Act is correct, that federal administrative agencies would never have to publish notice of purely prospective rule modification. In this regard, appellants note, and request that the Court take judicial notice, of the fact that federal administrative agencies frequently include so-called "grandfather" provisions in modification of existing rules, so that only future applicants for agency relief will have to comply with more stringent regulatory provisions. Clearly, however, such "grandfather" provisions should never be held to exempt an administrative agency from complying with its statutory obligations to inform the public of proposed changes in its rules so that it may receive comments thereupon, and educate itself properly before implementing the changes which it has proposed.

In summation, when appellees-defendants sought to modify a long existing policy regarding deferred departure for families of resident aliens, it should have published its intention to do so as required by statute. By failing to do so, the Immigration Service insulated itself from the public participation required by law, prevented the dissemination of public notice as required by law, and extinguished the

contingent rights of a large number of individuals. Such illegal administrative action should not be permitted to stand.

CONCLUSION

For the reasons noted above, it is respectfully requested that the decision of the district court be reversed and that an injunction issue against the INS policy involved in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

State of New York)
) SS:
County of New York)

Judith Felsen, being duly sworn, deposes and says that on this date I served three copies of the attached BRIEF FOR APPELLANTS-PLAINTIFFS upon the APPELLEES-DEFENDANTS by mailing three copies thereof, postage prepaid, to the following counsel of record:

PAUL J. CURRAN
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DATED:
May 31, 1974

Judith Felsen

Judith Felsen

Subscribed and sworn to

before me, this 31st day

of May, 1974.

Leon Friedman

LEON FRIEDMAN
Notary Public, State of New York
No. 31-6414025
Qualified in New York County
Commission Expires March 30, 1976